S T A T E O F M I C H I G A N

C O U R T O F A P P E A L S

TRAVIS NIXON and DAVID GALLINAT,

Plaintiffs/Counter Defendants-Appellants,

v

TEI CANADA 2 CORPORATION,

Defendant/Counter Plaintiff-Appellee.

UNPUBLISHED
February 13, 2007

No. 272439
Oakland Circuit Court
LC No. 06-072963-CK

Before: Sawyer, P.J., and Fitzgerald and Donofrio, JJ.

PER CURIAM.

Plaintiffs appeal as of right from the trial court order denying their motion for summary disposition under MCR 2.116(C)(10) and granting summary disposition in favor of defendant TEI Canada 2 Corporation (TEI). We affirm. This appeal has been decided without oral argument pursuant to MCR 7.214(E).

On July 8, 2005, the parties entered an agreement in which TEI agreed to sell plaintiffs a business it owned, Pattern Equipment and Prototype International Corp (PEP), for 1.5 million Canadian dollars. After the agreed-upon period for plaintiffs to conduct a due diligence investigation expired, no closing occurred. Plaintiffs filed suit, alleging that TEI acted to delay the closing in breach of the contract. Plaintiffs then filed a motion for summary disposition, seeking an order requiring specific performance of the agreement or, in the alternative, a preliminary injunction preventing TEI from removing any assets or profits from PEP. The trial court found that, because TEI's lender, Comerica Bank, had not approved the sale, a condition precedent had not been met and therefore an enforceable contract did not exist. The trial court denied plaintiffs' motion and granted summary disposition in favor of TEI under MCR 2.116(I)(2). The instant appeal followed.

The decision to grant or deny summary disposition presents a question of law that we review de novo. *Veenstra v Washtenaw Country Club*, 466 Mich 155, 159; 645 NW2d 643 (2002). Similarly, the proper construction and interpretation of a contract presents a question of law subject to de novo review. *Bandit Industries, Inc v Hobbs Intern, Inc*, 463 Mich 504, 511; 620 NW2d 531 (2001).

Under MCR 2.116(C)(10), summary disposition is appropriate when there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law. *West v General Motors Corp*, 469 Mich 177, 183; 665 NW2d 468 (2003). But "[i]f it appears to the court that the opposing party, rather than the moving party, is entitled to judgment, the court may render judgment in favor of the opposing party." MCR 2.116(I)(2); *Auto-Owners Ins Co v Allied Adjusters & Appraisers, Inc*, 238 Mich App 394, 397; 605 NW2d 685 (1999).

"The primary goal in the construction or interpretation of any contract is to honor the intent of the parties." *Klapp v United Ins Group Agency, Inc*, 468 Mich 459, 473; 663 NW2d 447 (2003), quoting *Rasheed v Chrysler Corp*, 445 Mich 109, 127 n 28; 517 NW2d 19 (1994). To accomplish this, a reviewing court must read the agreement as a whole and "attempt to apply the plain language of the contract itself." *Old Kent Bank v Sobczak*, 243 Mich App 57, 63; 620 NW2d 663 (2000). Where the language of a contract "fairly allows but one interpretation," it is unambiguous and the court must enforce it as written. *Morley v Automobile Club of Michigan*, 458 Mich 459, 465; 581 NW2d 237 (1998).

> A "condition precedent" is a fact or event that the parties intend must take place before there is a right to performance. A condition precedent is distinguished from a promise in that it creates no right or duty in itself, but is merely a limiting or modifying factor." Courts are not inclined to construe stipulations of a contract as conditions precedent unless compelled by the language in the contract. [*Mikonczyk v Detroit Newspapers, Inc*, 238 Mich App 347, 350; 605 NW2d 360 (1999), quoting *Reed v Citizens Ins Co of America*, 198 Mich App 443, 447; 499 NW2d 22 (1993), overruled on other grds *Griffith v State Farm Mut Auto Ins Co*, 472 Mich 521; 697 NW2d 895 (2005).]

Nevertheless, "[f]ailure to satisfy a condition precedent prevents a cause of action for failure of performance." *Berkel & Co Contractors v Christman Co*, 210 Mich App 416, 420; 533 NW2d 838 (1995).

Paragraph 15 of the parties' agreement states:

> *This* agreement is contingent on Comerica Bank's approval and if denied, shall be null and void.

The clear and unambiguous language of this provision creates a condition precedent. Plaintiffs concede that Comerica had not given its approval for the sale of PEP. Because of the failure of this condition, TEI has no obligation to perform under the agreement and plaintiffs may not bring a cause of action regarding its failure to perform. *Mikonczyk*, *supra* at 350; *Berkel*, *supra* at 420. Thus, the trial court did not err in determining that an enforceable contract did not exist and in denying plaintiffs' motion for summary disposition.

Plaintiffs argue against this result by asserting that Comerica's approval was unnecessary and immaterial because they have sufficient funds to payoff any outstanding loans. In support of their position, they cite several cases, including *Walker & Co v Harrison*, 347 Mich 630, 635; 81 NW2d 352 (1957), and *Omnicom of Michigan v Giannetti Inv Co*, 221 Mich App 341, 348; 561 NW2d 138 (1997), for the premise that an immaterial breach should not serve as the basis for

nullifying a contract. But the trial court did not find that the failure to secure approval from Comerica constituted a material breach of the agreement. Rather, as stated above, the trial court correctly found that no contract existed for failure to meet a condition precedent.

Plaintiffs further argue that trial court erred in finding that the approval condition had not been met. They assert, based on the wording of paragraph 15, that the agreement is only null and void if Comerica denies approval. Although Comerica had not approved plaintiffs' purchase of PEP, it never denied approval. Plaintiffs therefore contend the provision is inapplicable and the contract should be enforced. However, plaintiffs' argument ignores the clear language of the provision stating that the agreement "is contingent upon" Comerica's approval. Contracts are to be "construed so as to give effect to every word or phrase as far as practicable." *Klapp*, *supra*, 467. Consequently, we affirm the trial court's order denying plaintiffs' motion for summary disposition and granting summary disposition in favor of TEI under MCR 2.116(I)(2).

Affirmed.

/s/ David H. Sawyer
/s/ E. Thomas Fitzgerald
/s/ Pat M. Donofrio